

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII JUNEAU, ALASKA NEW ORLEANS, LOUISIANA OAKLAND, CALIFORNIA SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C. ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 24, 2003

Via Facsimile, Followed by U.S. Mail

J. Michael Klise Crowell & Moring 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2595

Wayne D. Hettenbach Wildlife and Marine Resources Section Environment and Natural Resources Division U.S. Department of Justice Benjamin Franklin Station, P.O. Box 7369 Washington, D.C. 20044-7369

> Re: Washington Toxics Coalition v. Environmental Protection Agency Case No. 01-0132C

Dear Michael and Wayne:

As we indicated in our telephone conversation on September 22, 2003, we believe exemptions to the standard buffers should be based on solid evidence that the types of uses and applications do not result in runoff or drift that pose a threat to listed salmonids. We have been searching for such evidence in the Mahini Declaration and exhibits, the industry pre-hearing amicus briefs, CropLife's partial spreadsheet, and the effects determinations. This has been a cumbersome process since CropLife has not focused on this type of evidence in its submissions and there often are inconsistencies between the representations made in the Mahini declaration and exhibits and CropLife's more recent, albeit partial, spreadsheet.

Despite these difficulties, we have developed the following nonstandard relief. This is necessarily a preliminary and partial list since we had been operating under the assumption that CropLife would make the initial proposals in this regard and we lack complete enough information to present our own proposals based on the information provided to date.

First, we propose one general exemption that would apply across the board to all pesticide products and ESUs:

• Indoor uses are exempt from the ground and aerial buffers.

Second, we propose one alternative buffer dimension that would apply to granular pesticide products:

• Granular formulations are subject to a 100-foot buffer for aerial applications instead of the standard 100-yard buffer; granular formulations remain subject to the 20-yard ground buffer unless otherwise explicitly stated below.

Third, we would exempt the following pesticides from the standard aerial buffer upon verification that there are no aerial application uses within the ESUs:

- 1,3-dichloropropene (telone)
- bensulide
- coumaphos
- fenamiphos
- phorate

Fourth, we would agree to the following pesticide-specific alternative buffers or exemptions:

- Pathway[™] and Tordon[™] RTU products containing 2,4-D are exempt from the 20-yard ground buffer for the following application methods: cut stump applications (applications to cut surfaces of trees and brush) and tree injection.
- Carbaryl products are exempt from the ground and aerial buffers when they are used in greenhouses, indoor household potted plants, flea and tick collars for dogs and cats, baits, and use on wasp and hornet nests.
- Carbofuran products are exempt from the buffers when used on pine seedlings by dipping the seedling roots in a 1% slurry containing the active ingredient.
- Checkmite+ Beehive Pest Control Strip and Co-Ral Plus Insecticide Cattle Ear Tag (containing coumaphos) are exempt from the buffers. The 20-yard ground buffer applies to livestock uses only for a 72-hour period following application.
- 25-foot ground and 150-foot aerial buffers apply to molinate and thiobencarb use on rice in the Central Valley California steelhead, Sacramento River winter-run chinook, and Central Valley spring-run chinook ESUs.

J. Michael Klise Wayne D. Hettenbach September 24, 2003 Page 3

We are continuing to review available materials for additional pesticide-specific buffers. We will also have questions to discuss in our negotiation session on buffers scheduled for this Friday.

Sincerely,

Patti Goldman

Amy Williams-Derry

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JUNEAU, ALASKA NEW ORLEANS, LOUISIANA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 25, 2003

Via Facsimile, Followed by U.S. Mail

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

J. Michael Klise Crowell & Moring 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2595

Re: Washington Toxics Coalition v. Environmental Protection Agency

Case No. 01-0132C

Dear Wayne and Michael:

We are writing to provide specific comments on EPA's September 24, 2003 draft of a framework injunction. We had provided oral comments on EPA's earlier draft, and also provided concrete suggestions in the form of a redrafted version, which responded to comments made by EPA and CropLife in our September 18, 2003, telephone conversation. Since EPA's new draft uses EPA's earlier draft rather than our redraft, and since EPA has suggested that the parties should file separate rather than a joint proposed framework injunction, we are now providing specific comments on the language in EPA's September 24, 2003 draft. We do not mean to suggest that we are agreeing to the EPA draft rather than the version we proposed on September 19, 2003. Instead, we are providing this information to move the parties closer to either a single proposed framework injunction or at least some common provisions for the separate proposals.

We changed the first sentence on page 1 because your language was awkward. The subject is "this matter" which is logically followed by the phrase "having come before the Court," but then the next line uses the phrase "having considered" as if it accompanied the Court as the subject earlier in the sentence, which it does not. Our language broke up the two phrases so that the Court would be the subject of the second sentence. We changed the reference to the August 14, 2003 oral argument so that it is listed as one of the bases for the injunction. EPA's draft suggested the injunction is issued "for the reasons expressed at the hearing," but it is not

Wayne D. Hettenbach J. Michael Klise September 25, 2003 Page 2

clear whether that refers to the Judge's statements or others' expressed views. Moreover, there are some inconsistencies between some of the statements made at the hearing and prior written Orders.

Your footnote 2 with a string citation to the listing decisions is inconsistent in capitalization of the type of salmon and inclusion or omission of "salmon." We will use whatever form you choose, so long as it is consistent. The term "These Orders" in footnote 2 is also confusing. We recommend the following as the sole lead into the listing decisions: "The July 2, 2002 Order, July 16 and August 8, 2003 Orders, and this Order apply to the following 26 Evolutionarily Significant Units of salmon and steelhead listed as threatened or endangered under the ESA:"

The sentence beginning on line 11, page 1 should list the July 16, 2003 Order as well as the August 8, 2003 Order. Rather than the statement "to prevent jeopardy," we will include a broader statement of the purpose of the injunctive relief to coincide with the language in the August 8, 2003 Order (at 18): "to substantially contribute to the prevention of jeopardy" and "prevent adverse effects on threatened and endangered salmonids."

We will propose an alternative "salmon supporting waters" definition soon. We want to ensure that estuaries are covered and that we are using the most accurate definition. We have concerns that streamnet may not be as comprehensive throughout Washington as it is in Oregon and that the SSHIAP database may be a better source for portions of Washington. The second sentence in footnote 3 may not be accurate given that tribal fish and wildlife agencies participate in streamnet. The USGS National Hydrography database likewise may not be comprehensive or targeted to denoting fish use. To the extent critical habitat is used in the definition, it is inappropriate to exclude areas excluded in the designation for policy reasons. We believe critical habitat is being used as a surrogate for the range of listed salmon and it does so without such exclusions.

On page 4, paragraph 2, why do you reference "appropriate for formal consultation" rather than EPA's "likely to adversely affect" determination?

As we indicated in our September 19, 2003 telephone discussion, we disagree with the exemption for "not likely to adversely affect" determinations. Apart from that disagreement, your language goes beyond what you asked the judge to exempt at the August 14, 2003 oral argument. At the argument, you sought an exemption for past determinations and relied heavily on the 7(d) determination which likewise applies to only past effects determinations. You suggested that we had misunderstood the request that you had made, but we have reviewed the transcript and cannot find where you made a broader, open-ended request.

Wayne D. Hettenbach J. Michael Klise September 25, 2003 Page 3

The language on page 5, lines 11-13, excluding "no effect" determinations differs from our language in one potentially significant respect. Your language applies when EPA has made a no effect determination while our language applies to no effect determinations that are in place. We want to make sure the language would not exempt a no effect determination that is later invalidated by a court or withdrawn by EPA. We would be happy to consider alternative language that would accomplish this goal.

We object to the language on page 5, lines 15-21, because it characterizes the court action as denying injunctive relief when it is granting such relief, and because it makes representations about what is and is not supported in the record when we may be agreeing to some pesticide-specific relief that is not fully supported to the extent warranted for such a finding. We do not believe this language is necessary. If you believe a statement is necessary, the order could state that "the court finds that the following relief is appropriate, rather than the standard buffers imposed in Section II."

As a matter of drafting, it would be simpler to have the vacature and enjoined language on page 6, lines 3-5, stated one time for all the pesticide-specific relief in the introductory paragraphs on page 5, rather than repeated numerous times.

We would prefer not to have the "recognized" statements on lines 8 and 11 on page 6, because we did not initially "recognize" and seek the noxious weed and NMFS' approval exemptions.

Please explain why you have not used our language for the public health exemption. When we discussed this exemption on September 18, 2003, you explained that you wanted to encompass contract and agency relationships so that public entity programs administered through such arrangements would be covered. We drafted language to accommodate that goal and do not understand why you want the more amorphous language.

We will provide a noxious weed exemption soon.

We believe your NMFS' approval exemption is overly broad in several respects. First, the use that is authorized under this exemption should be the specific use that is authorized by NMFS. It is not sufficient that NMFS "addressed" the use if it did not authorize the action through any of the means in the exemption. Second, the third exemption pertaining to section 10(a) permits and the fourth exemption pertaining to section 4(d) limits are not linked to pesticide uses authorized by NMFS as are the earlier formal and informal consultations exemptions. Third, we are still unclear whether there are any section 10(a) permits other than incidental take permits that should be included in this exemption. We have been unable to identify any other types of permits that apply. We will be happy to consider broader language if

Wayne D. Hettenbach J. Michael Klise September 25, 2003 Page 4

there are such situations. Fourth, our language ties any 4(d) limits to the salmon 4(d) rule. Why did you omit such references?

For the urban restrictions, we believe the language about what is and is not supported by the record is confusing and unnecessary. Triclopyr is omitted from footnote 8 and we suggest that references to triclopyr specify that it is BEE rather than TEA. We will re-insert our definition of urban areas into this section. We will also re-insert the language that makes it clear that the urban restrictions are in addition to buffers in these areas.

For the effective date of this order, we object to the language "to the maximum extent practicable." We will need to discuss further appropriate effective dates and whether to have one or two.

For the terminating events, we believe the introductory paragraph should specify that the terminating events apply to particular pesticide active ingredients and salmon ESUs. Instead of the language on page 8, line 4, defining the biological opinion as "involving" a salmon ESU, it would be more precise to refer to a "biological opinion for a Pesticide and Salmon ESU subject to the Court's July 2, 2002 Order." "Involving" is vague, whereas there should be agreement that this provision pertains only to biological opinions for the pesticides at issue. Why are you using the phrase "for ESA section 7 compliance purposes"?

In the last section, we object to the phrase "in addition to the automatic terminating events described in this Order." It suggests that the parties would be limited to requests to terminate the injunction. However, there could be situations in which we would seek expansion. For example, if a no effect determination is withdrawn, vacated, or the subject of a NMFS' objection, we might want to seek a modification to include that pesticide use. We want to have the Order drafted to preserve that right.

We will also re-insert implementation provisions.

Sincerely,

Patti Goldman

Amy Williams-Derry



BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII JUNEAU, ALASKA NEW ORLEANS, LOUISIANA OAKLAND, CALIFORNIA SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON D.C. ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 26, 2003

Via Email, Followed by U.S. Mail

J. Michael Klise Crowell & Moring 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2595

Re:

Washington Toxics Coalition v. Environmental Protection Agency

Case No. 01-0132C

Dear Michael:

Yesterday, we received CropLife's spreadsheet proposing alternative buffers for approximately ½ of the pesticide products at issue. The cover email indicated that the spreadsheet provided is not the finalized version and that additional information will be submitted as it is received by CropLife. By this letter, we are lodging our objection to the presentation of any additional buffer proposals beyond those contained in the spreadsheet submitted yesterday.

CropLife had originally agreed to provide us its buffer proposal by September 15 or 16, 2003. At that time, however, CropLife provided a proposal for only approximately 10% of the pesticide products on its spreadsheet and it subsequently noted that it had inadvertently omitted another six pesticides and an unknown number of products containing those pesticides. By letter dated September 18, 2003, we asked for additional specific information documenting the products' potential to produce runoff and drift. However, by letter dated September 23, 2003, CropLife indicated it would continue to present buffer proposals based on the registrants' disagreement with the Court's determination that buffers zones are a "common, simple, and effective strategy" and that the buffers by plaintiffs will "substantially contribute to the prevention of jeopardy." July 16, 2003 Order at 3. This type of presentation rarely presents the type of information plaintiffs need to assess a particular pesticide products' runoff or drift potential. This choice on CropLife's part appears to have impeded its ability to produce proposed buffers on the full range of pesticides in a timely manner and to provide plaintiffs with the type of documentation that they need to ascertain whether alternative buffer zones are warranted for particular products.

J. Michael Klise September 26, 2003 Page 2

Even after CropLife adopted its chosen course of action, it promised to provide plaintiffs its full buffer proposal by the close of business on September 25, 2003, the date the parties' proposed order was originally due, and the day prior to the parties' only scheduled negotiation on alternative buffers, which is scheduled to begin at 10 a.m. PST on September 26, 2003. CropLife represented that it would provide its full buffer proposal on September 25, 2003 in numerous telephone calls between the parties, including calls on September 22, 24, and 25, 2003. Given these repeated representations and the schedule jointly established by the parties, we were quite surprised and dismayed to receive only a partial proposal by the close of business yesterday.

It is our position that it is now simply too late for CropLife to make additional proposals for alternative buffers. Six weeks ago (and with a deadline of yesterday), the Court directed the parties to cooperate in drafting a form of injunction and specified that this should not be a one-party effort. If CropLife continues to develop buffer proposals that cannot be presented to plaintiffs in a manner that will allow meaningful consideration and discussion at today's negotiation session, it is our position that its proposals would be a one-party effort. We will, therefore, object if CropLife presents such proposals to the Court for consideration.

Sincerely,

Patti Goldman

cc: Wayne D. Hettenbach

Patti Goldman

Patti Goldman From:

Friday, September 26, 2003 5:10 PM Sent: 'Wayne.Hettenbach@usdoj.gov' To:

'mark dyner (dyner.mark@epamail.epa.gov)'; J. Michael Klise (jmklise@crowell.com) Cc:

Subject: RE: Washington Toxics -- effective date of the order & noxious weed proposal



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Wayne

We will agree to a November 30, 2003 effective date for the order.

I am also attaching our proposed order as it is evolving. In contains our noxious weed proposal, which is drawn from NMFS' biological opinions for BLM and Forest Service noxious weed programs. It also contains our current proposal for defining "Salmon Supporting Waters."

Importantly, it presents our current thinking as to how to present the standard buffers, the specific pesticide, product, or use based buffers, pesticide product exemptions from the buffers, nonpesticide specific use-type exemptions, and program exemptions. We have presented each in separate paragraphs or sections for clarity and are open to suggestions. We have also tried to present the alternative buffers in a manner that allows us to present the vacature language and your proposed next sentence one time up front and then list each pesticide-specific buffer scenario below. We have only begun to insert content into these sections so the entries are incomplete. Please let us know your current thinking on presentation of each of these sections.

As I have stated repeatedly, I do think we need to strive for consistency, if not a joint proposed order, in part. I believe we should be able to agree on identical language to use in the first paragraph (but for the specific finding language), Section I in its entirety, Section III paragraph 1, the introductory language and structure of Section III, paragraphs 2 and 3 and Section IV, the bulk of Section V where there are no substantive differences, the entirety of Sections VII and IX, and Section VII except for the NLAA provision as to which we disagree.

Also I am pasting in the link to the SSHIAP database in response to Mark's request. www.wa.gov/wdfw/hab/sshiap

Patti

Patti Goldman Earthjustice 705 Second Ave., Suite 203 Seattle, WA 98104

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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 29, 2003

Via Email, Followed by U.S. Mail

J. Michael Klise Crowell & Moring 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2595

Re: Washington Toxics Coalition v. Environmental Protection Agency

Case No. 01-0132C

Dear Michael:

I am writing to clarify our position with respect to alternative buffers for specific pesticide products and uses.

First, you indicated in your letter dated September 23, 2003, and again in our buffer negotiation session on September 26, 2003, that you believed plaintiffs would not consider any alternative buffers unless those alternatives are supported by an EPA effects determination or similar evidence. As I believe our proposals both in writing on September 24, 2003, and in the negotiation session indicate, and our questions and suggestions support, we are willing to consider alternative buffers or exemptions where evidence or reasoning has been provided to us showing less potential for runoff or drift than generally occurs from use of the pesticide. We thought our letters of September 2, and 28, 2003, had made our position clear. We remain ready and willing to negotiate alternative buffers if CropLife provides supporting information.

Second, we were prepared to discuss each of CropLife's proposals at our September 26, 2003 negotiation session. We had identified: (1) modifications of some of CropLife's proposed buffers that we would be willing to discuss or accept; (2) additional information that could convince us that an alternative buffer is appropriate; and (3) erroneous statements in the reasoning offered by CropLife for a proposed buffer. It became clear during the negotiation session, however, that CropLife was unable or unwilling to negotiate alternative product- or usespecific buffers. CropLife appears to be serving as a conduit transmitting the views of the various registrants without constraining those proposals to fit the parameters established by the Court or the negotiation context. While the parties may be able to agree to some across-the-

J. Michael Klise September 29, 2003 Page 2

board exemptions or alternative buffers for some devices and application methods, CropLife is presenting its proposed product-specific buffers on a take-it-or-leave-it basis. If plaintiffs are unwilling to accept the alternative buffer as proposed (which in many cases is no buffer at all), there is no room to negotiate. In our view, this approach is a one-party effort contrary to the Court's direction at the August 14, 2003 oral argument.

Sincerely,

Patti Goldman

cc: Wayne D. Hettenbach

Wildlife and Marine Resources Section

Environment and Natural Resources Division

U.S. Department of Justice

Benjamin Franklin Station, P.O. Box 7369

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September 29, 2003

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J. Michael Klise 202 624-2629 jmklise@crowell.com

BY E-MAIL, FOLLOWED BY FIRST CLASS MAIL

Patti Goldman
Earthjustice Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104-1711

Re: Washington Toxics Coalition v. EPA, No. C01-0132C (W.D. Wash.)

Dear Patti:

I write in response to your letter dated September 29, 2003.

First, based on your statements during our three-party discussion of proposed buffer zones, I do not dispute that plaintiffs are prepared to negotiate alternatives to plaintiffs' proposed buffers if CropLife provides additional information. I said as much during the call. Our disagreement is not about that, but about the type of information that CropLife must provide if plaintiffs are to accept alternatives to their proposed 100-yard and 20-yard buffers. Although plaintiffs and intervenors have not reached an accord, intervenors have participated in good faith in the type of discussion Judge Coughenour envisioned.

That brings me to your second point, which is that our approach is, in your words, "a one-party effort contrary to the Court's direction at the August 14, 2003 oral argument." Intervenors disagree with that characterization, which substitutes a concept of settlement negotiations for Judge Coughenour's remarks in trying to get the parties to agree on a proposed form of order. Here is what he said:

I would like you to give careful consideration to the suggestions in Mr. Klise's submittal, the Mahini affidavit, regarding specific crop and chemical limitations. Like, for example, the suggestion as to one of the chemicals that it's directly injected into the soil so that isn't as much of a runoff problem. If it's applied in that manner, the buffer ought to be different or maybe not even apply at all.

I'd like you to give . . . careful consideration to that submittal and try to draft crop specific and chemical specific limitations that will take into consideration the practical realities of farming and not

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crowell

impose restrictions beyond what is necessary to give the protection to the salmon that we are trying to accomplish.

I would like the parties to submit something after consultation among yourselves and I don't want this to be a one-party effort.

The court's directive was that plaintiffs give "careful consideration" to intervenors' proposals, not that intervenors engage in full-fledged bargaining with plaintiffs and compromise the buffers proposed by the non-party registrants, formulators, and manufacturers of the pesticide products at issue. With that directive in mind, intervenors have expended considerable time and resources gathering information from those roughly 25 companies and have presented it to plaintiffs in a series of spreadsheets that show details such as the range of products containing the active ingredients, their methods of application, and the crops to which they are applied. That information supplements the information summarized in Mahini Declaration Exhibit 1, addresses the court's interest in crop-specific uses, and in a very few cases modifies intervenors' proposed buffers to which the court had alluded.

Intervenors discussed the spreadsheet and the Mahini Declaration at some length with you and the federal defendants during our two-hour conference call on September 26. At that time, we also discussed and suggested enlarging the use-specific exemptions you had conveyed to us prior to the call; and we discussed embodying our points of agreement in the body of the proposed form(s) of order to be submitted to the court. Neither that discussion nor the several other conference calls intervenors have had with plaintiffs and federal defendants sound like a one-party effort to me.

Sincerely,

J. Michael Klise

cc (by e-mail): Wayne D. Hettenbach

Environment and Natural Resources Division

wdh

90-8-6-05041

Wildlife and Marine Resources Section P.O. Box 7369 Ben Franklin Station Washington, DC 20044-7369 Telephone (202) 305-0213 Facsimile (202) 305-0275

September 30, 2003

Via Facsimile

Patti Goldman
Earthjustice Legal Defense Fund, Inc.
203 Hodge Building
705 Second Ave.
Seattle. WA 98104-1711

e: Washington Toxics Coalition et al v. EPA,

Dear Patti:

Enclosed, please find a tentative final draft order. As we have agreed, the parties are to exchange such an order to allow each other to identify those areas were the parties have not agreed. This tentative final draft order may be subject to some changes, but this should give you a reasonable basis to generate the five page document highlighting the differences for the court that we have also agreed the parties may submit.

Please note one particular area that we anticipate changing at this point is the wording of the paragraph defining Salmon Supporting Waters. We do not intend to change the substance of any of the references or the manner in which we are proposing that these waters be determined, but rather may be simplifying the language. In any event, since we do not agree to the new method that plaintiffs have proposed, I do not expect this change to be problematic for purposes of identifying differences in the orders we are presenting.

As of 7:30 pm, I still have not received plaintiffs version of the order.

Sincerely,

Wayne Hettenbach

Trial Attorney (202) 305-0213

Patti Goldman

From: Patti Goldman

Sent: Tuesday, September 30, 2003 5:04 PM

To: "Wayne.Hettenbach@usdoj.gov'; J. Michael Klise (imklise@crowell.com)

Cc: 'dyner.mark@epamail.epa.gov'; Amy Williams-Derry

Subject: Plaintiffs' Proposed Order

Wayne & Michael

Attached is plaintiffs' proposed order. As we agreed, we will be filing it with the Court with a notice of filing that is no longer than 5 pages in length. We will also be submitting a table that provides plaintiffs' reasoning for their buffers and any rejection of CropLife's proposed buffers. Given that we did not receive CropLife's full spreadsheet until yesterday and that we did not agree that the parties could submit reasoning to the Court until Friday's negotiation session, we have just begun to draft our reasoning and have entries at this time only in rough draft form. Accordingly, we are unable to provide it to you at this time. If we have finalized portions tomorrow, we will forward them to you. However, it appears more likely that we will not have a finalized version until Thursday.

Patti



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